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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW JOHN CAPANIS,

Defendant and Appellant.

A151544

(Contra Costa County  
Super. Ct. No. 51319284)

On August 5, 2012, defendant Matthew Capanis and Jacob Stephens confronted Ulises Grijalva at the St. John's Apartment complex in Richmond and accused him of breaking into the apartment of Capanis's girlfriend. Capanis and Stephens, both of whom were alleged to be members of the Norteño gang, then drew weapons and fired several shots at Grijalva, killing him. After a jury trial, Capanis was found guilty of first-degree murder committed to further the activities of a criminal street gang, active participation in a criminal street gang, and possession of a firearm by a felon. He was sentenced to life in prison without possibility of parole on the murder count. On appeal, he raises numerous evidentiary and instructional challenges to his conviction, and argues that he is entitled to remand for resentencing in light of legislation enacted while his appeal was pending. We will modify the trial court's restitution order and remand for resentencing, but otherwise affirm.

## FACTUAL BACKGROUND<sup>1</sup>

### *The Shooting*

On the evening of August 5, 2012, Nestor Navarro was doing laundry and hanging out with a man nicknamed “Nuts,” 16-year old Ulises Grijalva, and a third man at the St. John’s Apartments in Richmond. Capanis, his girlfriend Maria, and Jacob Stephens arrived at the complex and went into Maria’s apartment. Shortly afterward, Capanis and Stephens returned and approached Navarro and his group. Capanis got “right in [Grijalva’s] face” and asked “Do you know who I am?” Grijalva replied “Yes, I know who you are,” and Capanis then said “Well, somebody broke into my house, and it fits your description.” Grijalva said he did not know what Capanis was talking about, and attempted to shake Capanis’s hand. Capanis asked Grijalva “who he hangs around with,” and Grijalva replied “us,” meaning the group he was with. Capanis then drew a gun and fired four or five shots at Grijalva. Stephens also drew a gun with a laser sight and began shooting. Navarro ran away from the scene. In total, he heard 10 or 11 gunshots.

Around 9:30 p.m. that night, Richmond Police Officer Alexander Caine was near the St. John’s Apartments when he heard gunfire. He saw an individual, later identified as Stephens, exit one of the pedestrian gates of the complex clutching a metal object in his right hand that appeared to be a firearm. Stephens ran through a front yard where Officer Caine briefly lost sight of him, and when he reemerged he was no longer holding the firearm. Stephens ignored Officer Caine’s orders to stop and Caine pursued him on foot, eventually tackling him and placing him under arrest. The police retrieved a silver revolver equipped with a laser sight from the spot where Caine had briefly lost sight of Stephens.

Grijalva’s autopsy revealed a total of six bullet wounds, one of which was a re-entry wound. The cause of death was multiple gunshot wounds. Seven bullets were recovered, four from Grijalva’s body and three from the scene. Forensic analysis indicated that two of those bullets, one from the body and one from the scene, were fired

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<sup>1</sup> We describe the facts and testimony at trial only as relevant for context and to the issues on appeal.

from the gun discarded by Stephens. The other five bullets, three from the body and two from the scene, were fired by a second gun.

### ***The Kidnapping***

In the early afternoon the day before the shooting, Jose Flores was at the front door of his apartment at the St. John's Apartments when he was approached by three men, one of whom was Capanis. One of the men pointed a gun at Flores. The men told Flores "You're gonna leave with us," and fired a shot. Flores then got into a car with the men and they began driving. Flores was in the back seat with the gunman, whom he later identified as Capanis. Capanis repeatedly asked Flores "where was all his stuff at," and hit Flores "a couple of times." Flores said he did not know what Capanis was talking about. After about ten or fifteen minutes, the men drove Flores to a dead end and told him to get out of the car. Flores asked to use the telephone at a nearby house and called Navarro, who came to pick him up. Flores did not report the kidnapping at the time, but eventually spoke with detectives and identified Capanis as the gunman from a photo lineup.

### ***Gang Evidence***

As will be discussed in further detail below, evidence of certain of Capanis's past convictions was admitted as relevant to the various gang allegations. In particular, the prosecution introduced evidence that Capanis committed an armed robbery in March 2007 with David Riley, for which both men went to prison in 2007. Riley testified as a witness for the prosecution, although he was unwilling to do so.

On January 18, 2009, California Department of Corrections and Rehabilitation (CDCR) Officer Karl Grether was in a guard tower over the administrative segregation unit at Susanville Correction Center. Grether saw Capanis and another inmate assigned to a new inmate named Vela as a "security blanket," meaning that they would accompany the new inmate until they determined whether or not he was in good standing with the Norteño gang. Two other individuals approached and the four men spoke to Vela and then took him to a corner of the yard. Capanis and another inmate then began punching Vela in the head and face. The assailants ignored Officer Grether's orders to get down.

Officer Grether fired two plastic rounds that hit Capanis, but he continued to assault Vela. While Grether was reloading his weapon, someone on the yard yelled out a command and the assault ended. According to a nurse's report regarding the incident, Vela suffered a laceration to the right side of his face.

CDCR Gang Investigator Sergeant Casey Walsh testified that a "kite" was an inmate manufactured written note using "micro writing" and containing information such as gang rules, enemy lists, membership lists, and history. Sergeant Walsh met Capanis in 2007 and conducted a gang investigation of him thereafter. Sergeant Walsh testified regarding a report describing an incident in which a kite was found in Capanis's anal cavity. The kite contained information regarding the Northern Structure prison gang.<sup>2</sup>

Sergeant Walsh also testified about the report of the January 2009 incident in which Capanis was seen assaulting an individual whom Sergeant Walsh opined was associated with the Sureño gang. Sergeant Walsh also observed a large "Huelga" bird tattoo on Capanis's lower back, and testified that the Huelga bird is a symbol of the Northern Structure prison gang. When asked a hypothetical question about an individual involved in the "security blanket" incident, the assault of a Sureño, and the Huelga bird tattoo, Walsh opined that such an individual would be a member of the Northern Structure gang.

Sergeant Michael Kindorf testified as a gang expert for the prosecution. To demonstrate the "pattern of criminal activity" required to meet the definition of a "criminal street gang," Kindorf testified that Alonzo Hernandez was a member of the Norteños, and in particular a member of the Varrio North Side (VNS) subset of the Norteños, from 2010 through 2012. The prosecution introduced certified documents showing that Hernandez was convicted of voluntary manslaughter in August of 2011 and of carrying a loaded firearm in December of 2011. Similarly, Kindorf opined that Mauro Gutierrez was a member of VNS and the Norteño gang in 2011 and 2012. Documents were introduced showing that Gutierrez was convicted of voluntary manslaughter with a

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<sup>2</sup> Walsh testified that Northern Structure and Norteño had a "synonymous" meaning.

gang enhancement in October 2011, a residential burglary in 2006, and twice of unlawfully taking a vehicle in 2006 and 2010.

Kindorf further testified that he had known Jacob Stephens since 2001. Stephens had tattoos of four dots below his right eye, a representation of the number 14 on his hands, and “XIV,” “VNS” and “scrap killer” on his torso and abdomen. Kindorf opined that Stephens was an “Norteno gang member part of VNS” on August 5, 2012.

Kindorf was asked a hypothetical question based on the facts of the shooting, including the belief by one Norteno gang member that someone had taken some of his stuff, the gang member asking that person “Man, who you kick it with?,” and the first gang member opening fire followed by the second gang member. Kindorf opined that the crime would have been committed for the benefit of the gang.

### **PROCEDURAL BACKGROUND**

On March 29, 2017, the Contra Costa District Attorney filed a second amended information charging Capanis with the murder of Grijalva (Pen. Code § 187, subd. (a))<sup>3</sup> (count 1). With respect to count 1, the information further alleged that Capanis committed the murder for the benefit of a criminal street gang (the “Varrio North Side(VNS)\Nortenos”) (§ 186.22, subd. (b)(1)(C)), that Capanis personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), and the special circumstance that Capanis committed the murder to further the activities of a criminal street gang (§ 190.2, subd. (a)(22)). Capanis was also charged with active participation in a criminal street gang (§ 186.22, subd. (a)) (count 2) and possession of a firearm by a felon (§ 29800, subd. (a)(1)) (count 3). The information alleged two prior prison terms pursuant to sections 667.5, subdivision (b), and enhancements based on the 2007 robbery conviction pursuant to section 667.5, subdivision (a), and section 667, subdivisions (a)(1), (d), and (e).

On April 24, 2017, a jury found Capanis guilty of first-degree murder and of counts 2 and 3 as charged, and all the enhancements true, with the exception of the prior

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<sup>3</sup> Further unspecified references are to the Penal Code.

prison term and conviction allegations, which had been bifurcated and were found true by the court.<sup>4</sup>

On May 26, 2017, the trial court sentenced Capanis to life in state prison without the possibility of parole for the murder and special circumstance on count 1, with a consecutive term of 25 years to life for the firearm enhancement, and a further consecutive five-year term for the prior robbery conviction under section 667, subdivision (a)(1). On count 2, the trial court imposed a sentence of nine years, consisting of the midterm of four years plus a five-year enhancement under 667, subdivision (a)(1). On count 3, the trial court imposed a sentence of two years, doubled for the prior strike for a total of four years. The trial court then stayed the sentences on counts 2 and 3 under section 654, and struck the remaining enhancement terms.

This timely appeal followed.

### **DISCUSSION**

Capanis argues that: (1) the trial court erred in excluding a hearsay statement by Stephens and certain testimony of Shamika Newman in support of a theory of self-defense; (2) the trial court erred in limiting the cross-examination of Flores regarding his arrest in 2016; (3) the trial court erred in refusing to give a requested instruction regarding evidence of Capanis's good character; (4) the trial court erred in admitting evidence of certain of his prior convictions; (5) the trial court erred in admitting evidence that his girlfriend had offered money in exchange for information about Navarro's whereabouts; (6) the trial court erred in permitting the prosecution's expert to testify regarding certain alleged hearsay statements; (7) substantial evidence does not establish the requisite organizational relationship between the Norteño gang and the VNS subset; (8) substantial evidence does not support the special circumstance finding for the same reason; (9) he is entitled to a remand for resentencing under recently passed legislation making the firearm enhancement imposed at sentencing discretionary; (10) the trial

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<sup>4</sup> The prosecution did not seek to impose any enhancements based on one of Capanis's prison priors, because "there is an argument that it is not a separate prison commitment."

court's restitution order was statutorily unauthorized; and (11) the cumulative effect of these errors requires reversal. In a supplemental brief, Capanis further argues that he is entitled to resentencing under recently passed legislation that makes the five-year prior conviction enhancement discretionary.

***I. The Trial Court Did Not Err In Excluding Certain Testimony of Shamika Newman and a Hearsay Statement by Stephens***

***A. Additional Background***

Capanis moved in limine to admit the testimony of Shamika Newman, a resident of the St. John's apartments, that Grijalva's "group sold marijuana, and she had seen them with guns."<sup>5</sup> Capanis also sought to introduce testimony by Officer Caine that shortly after he tackled Stephens, Stephens made a statement to "the effect that they were shooting and he ran because he was scared." Capanis argued that this evidence supported a theory that Grijalva's group had fired first and that he had therefore acted in self-defense.

The trial court held a hearing under Evidence Code section 402 regarding Stephens's statement to Officer Caine. The court wanted to review any subsequent interviews or statements by Stephens in order to determine whether they were consistent with the allegedly spontaneous statement. The prosecutor indicated that there was a recorded interview with Stephens some five or six hours after his arrest and that a recording of that interview would be provided to the court. The court then took the matter under submission.

After reviewing the recording, the trial court explained that in the interview, Stephens seemed to provide two theories to the police: first, that he and Capanis were the only people involved and that Capanis was shooting at him, and second, that Capanis had fired first at Grijalva's group and then at him. The court noted that Stephens said "Mr. Capanis is the initial shooter, under either of the theories that he provides."

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<sup>5</sup> Capanis's motion also indicated that Newman would testify that she saw "Deja," a friend of Grijalva's, grab an object from Grijalva's body after he had been shot and run off.

The court concluded that the statement was not a spontaneous declaration under Evidence Code section 1240. In doing so, the court stated that it was relying primarily on two facts. The first was that Stephens ran from the police and admitted in his later interview that he had no interest in talking to them, suggesting “that he has no interest in talking to or telling anybody the truth about anything, particularly the police since he runs away from the police officer.” The second was that Stephens had been arrested a number of times and convicted of a number of offenses, and therefore was not under stress on this occasion that would have led him to be truthful to the police. The court also noted that the initial statement was “subject to a lot of interpretation because it’s brief and doesn’t purport to lay out a clear indication of what happened,” and to the extent it indicated that others shot first, was not consistent with the version of events that Stephens offered in his later interview. Finally, the trial court found that even if the statement were otherwise admissible, it would exclude it under Evidence Code section 352 on the grounds that the probative value would be outweighed by undue consumption of time, because admitting it would require admitting the inconsistent statements made in Stephens’s hours-long subsequent interview with the police for impeachment purposes, thus necessitating a “trial within a trial.”

With respect to Newman’s testimony, the trial court ruled that it would not permit her to testify that she had previously seen one of Grijalva’s group with a gun, given that she “hasn’t specifically identified Mr. Grijalva as that person, or that any of the persons who may have had a gun previously were, in fact, there when the shooting happened.” Ultimately, Newman did not testify.

B. *Analysis*

Capanis argues that the trial court erred in concluding that Stephens’s statement was not admissible as a spontaneous declaration. He also argues that the trial court’s conclusion that admitting the statement would necessitate undue consumption of time was an abuse of discretion. With respect to Newman’s testimony, he argues that it was relevant character evidence and should have been admitted. Finally, Capanis argues that the trial court erred in refusing to instruct the jury on self-defense.

1. *Stephens's Statement*

Evidence Code section 1240 provides: “Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception.” To qualify as spontaneous under Evidence Code section 1240, a statement must have been made “ ‘before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance.’ ” (*People v. Thomas* (2011) 51 Cal.4th 449, 495 (quoting *People v. Poggi* (1988) 45 Cal.3d 306, 318).)

We review the trial court’s conclusion that Stephens’s statement was not admissible as a spontaneous statement for abuse of discretion. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1288–1289.) And “ ‘[t]he discretion of the trial court is at its broadest’ when it determines whether an utterance was made while the declarant was still in a state of nervous excitement. (*People v. Poggi* [(1988)] 45 Cal.3d [306], 319.)” (*People v. Thomas, supra*, 51 Cal.4th at p. 496.)

We find no abuse of discretion. Officer Caine testified that Stephens ignored commands to stop while he was identifying himself as a police officer, ran approximately 100 yards over a period of some 15 to 20 seconds, discarded the firearm he was carrying, and only stopped running because Caine tackled him. It was only after all this—and after Caine handcuffed Stephens and began frisking him—that he made the statement in question. If Stephens had time to decide to run from the police and to discard his firearm, he had time to “contrive and misrepresent” and make a statement in his own self-interest, or at least the trial court did not abuse its discretion in so concluding. (*People v. Poggi, supra*, 45 Cal.3d at p. 318.)

2. *Newman's Proffered Testimony*

Capanis argues that the trial court should have permitted Newman to testify that she had previously seen Grijalva's "group" with guns, in order to support the inference that Grijalva had a gun on this occasion, that "Deja" removed the gun from his body, and that Capanis had thus acted in self-defense. Capanis relies on Evidence Code section 1103, subdivision (a), which provides that "evidence of the character or a trait of character (in the form of . . . evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." We review the trial court's ruling under Evidence Code section 1103 for abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Cox* (2003) 30 Cal.4th 916, 955.) And find none.

As noted, Newman did not testify. Capanis's motion described her proffered testimony as being that she had seen "[Grijalva's group] . . . with guns." Capanis's counsel described the testimony as her "observation of guns on Mr. Grijalva's cohort," and when asked by the court whether she had seen Grijalva himself with a gun, he replied "The statement that I have was his group, the people he associated with." Given the vague nature of this testimony, and the fact that Newman did not identify Grijalva specifically as having possessed a gun at whatever unspecified point in the past, the trial court did not abuse its discretion in declining to admit her testimony under Evidence Code section 1103.<sup>6</sup>

Finally, because Newman's testimony and Stephens's statement were the only evidence even arguably supporting a theory of self-defense, the trial court did not err in refusing to so instruct the jury.

## **II. *The Trial Court Did Not Err In Limiting the Impeachment of Jose Flores With His Recent Arrest***

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<sup>6</sup> Given our conclusion, we need not reach Capanis's argument that the trial court also erred in its alternative holding that even if the evidence were admissible under Evidence Code section 1103, it would exclude it under Evidence Code section 352.

A. *Additional Background*

As noted, Jose Flores testified that he was abducted by Capanis and two other men the day before the shooting. Before trial, the prosecution moved to exclude evidence of a February 2016 incident in which Flores was arrested, which the defense sought to use for impeachment purposes. In that incident, police were dispatched in response to reports of gunfire and found Flores in the driver's seat of a vehicle with a female passenger, and three other men standing outside. A backpack was located in the backseat of the car containing marijuana packaged for sale, and a loaded firearm was found under a nearby car. Eight bullets were also in the backpack, matching the caliber and manufacturer of the bullets in the loaded firearm. Flores was ultimately arrested for possession of marijuana for sale and possession of a loaded firearm. The case was never submitted to the District Attorney's office for prosecution and Flores was never charged in connection with the incident.

After hearing argument, the trial court permitted defense counsel to ask whether Flores was arrested in February of 2016 and whether or not his testimony at trial was in any way motivated by any promises or expectations from the prosecution arising out of that arrest. The trial court excluded the underlying facts of the offense under Evidence Code section 352. On cross-examination, defense counsel asked Flores whether he had been arrested in February of 2016, and whether he was "concerned about what might happen due to that arrest from February of last year if you didn't cooperate with the DA's subpoena." Flores answered "No."

B. *Analysis*

Capanis argues that the trial court abused its discretion in not permitting him to cross-examine Flores regarding the facts underlying his arrest because possession of marijuana for sale and carrying a concealed firearm are crimes of moral turpitude, and that the exclusion of that evidence violated his rights under the confrontation clause.<sup>7</sup>

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<sup>7</sup> The record indicates Flores was arrested for carrying a loaded firearm. Capanis nevertheless relies on cases involving carrying a *concealed* firearm. (See *People v.*

“A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court’s exercise of discretion under Evidence Code section 352. (*People v. Wheeler* (1992) 4 Cal.4th 284, 290–296 [Prop[osition] 8 allows impeachment with conduct amounting to a misdemeanor offense]; see also *People v. Mickle* (1991) 54 Cal.3d 140, 168 [jailhouse informant could be impeached with evidence he had threatened witnesses in his own case].)

“ ‘[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad.’ (*People v. Wheeler, supra*, 4 Cal.4th at p. 296, fn. omitted; see also *People v. Castro* (1985) 38 Cal.3d 301, 316.) When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness’s honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant’s decision to testify. (*People v. Beagle* (1972) 6 Cal.3d 441, 453; *People v. Green* (1995) 34 Cal.App.4th 165, 183.) Additional considerations apply when the proffered impeachment evidence is misconduct other than a prior conviction. This is because such misconduct generally is less probative of immoral character or dishonesty and may involve problems involving proof, unfair surprise, and the evaluation of moral turpitude. (*People v. Wheeler, supra*, at p. 296.) As we have advised, ‘courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.’ (*Id.* at pp. 296–297.)

“Because the court’s discretion to admit or exclude impeachment evidence ‘is as broad as necessary to deal with the great variety of factual situations in which the issue arises’ (*People v. Collins* (1986) 42 Cal.3d 378, 389), a reviewing court ordinarily will uphold the trial court’s exercise of discretion (*ibid.*; see *People v. Hinton* (2006) 37

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*Robinson* (2005) 37 Cal.4th 592, 624–625; *People v. Aguilar* (2016) 245 Cal.App.4th 1010, 1018–1019.)

Cal.4th 839, 888; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)” (*People v. Clark* (2011) 52 Cal.4th 856, 931–932, fn. omitted.) And we easily find no abuse of discretion.

With respect to the possession of marijuana for sale, as the trial court noted, the conduct was unlike fraud or perjury, and the implication of dishonesty was an indirect one. (See *People v. Castro, supra*, 38 Cal.3d at p. 317 [“the trait involved [in possession of marijuana for sale] is not dishonesty but, rather, the intent to corrupt others”].)

Although the conduct was near in time to Flores’s testimony at trial, and thus perhaps relevant to his credibility with respect to that testimony, this relevance was blunted by the fact that it had been over four years since the time of the shooting and Flores’s original statement to the police in August of 2012. And the conduct involved problems of proof and undue consumption of time, because it was recent and uncharged and thus would have implicated Flores’s privilege against self-incrimination and necessitated his obtaining counsel.

With respect to carrying a concealed firearm, the evidence presented all the above problems, plus the additional difficulty that the evidence did not clearly demonstrate that Flores engaged in the conduct at all: as noted, the gun was found under a nearby car, and its only connection to Flores was tenuous, i.e., that the bullets inside the gun were of the same caliber and manufacturer as those found inside the backpack. (See *People v. Aguilar* (2016) 245 Cal.App.4th 1010, 1016–1020 [certain crimes involving firearms demonstrate moral turpitude to the extent they show “readiness to do evil”].) The trial court did not abuse its discretion in concluding that the probative value of this conduct was outweighed by the problems with its admission. For similar reasons, the trial court’s ruling did not violate Capanis’s rights under the confrontation clause. (See *People v. Brown* (2003) 31 Cal.4th 518, 545 [“reliance on Evidence Code section 352 to exclude evidence of marginal impeachment value that would entail the undue consumption of time generally does not contravene a defendant’s constitutional rights to confrontation and cross-examination”].)

### **III. *The Trial Court Did Not Err in Declining to Give an Instruction on Good Character***

A. *Additional Background*

Riley pleaded guilty to committing armed robbery with Capanis in 2007 and went to prison with him toward the end of that year. He testified for the prosecution and told the jury that he had known Capanis since he was ten years old and that “Matt is a good person and I know he’s been around bad people and when you are around bad people, bad things happen and here he is now again.”

On the basis of this testimony, defense counsel requested that the jury be instructed with CALCRIM No. 350, telling the jury that it had heard evidence that Capanis “was a law-abiding citizen at or about the time of the offense” and that such evidence “can by itself create a reasonable doubt” whether Capanis committed the charged offense.<sup>8</sup>

The trial court indicated that it had previously “excluded a whole bunch of questions that [the prosecutor] wanted to ask about [Riley’s] knowledge of Mr. Capanis’s ongoing criminal activity at the time that they then had their contacts when they both got out of prison.” It concluded that giving the instruction would give the jury “a distorted view of this character evidence testimony, if you could call it that, when . . . the ruling that I made functionally benefitted Mr. Capanis by excluding from evidence questions about subsequent criminal conduct other than the charges in this case that occurred after he was released from prison.

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<sup>8</sup> CALCRIM No. 350 provides: “You have heard character testimony that the defendant (is a \_\_\_\_\_ <insert character trait relevant to crime[s] committed> person/ [or] has a good reputation for \_\_\_\_\_ <insert character trait relevant to crime[s] committed> in the community where (he/she) lives or works). [¶] Evidence of the defendant’s character for \_\_\_\_\_ <insert character trait relevant to crime[s] committed> can by itself create a reasonable doubt [whether the defendant committed \_\_\_\_\_ <insert name[s] of alleged offenses[s] and count[s], e.g., battery, as charged in Count 1>]. However, evidence of the defendant’s good character may be countered by evidence of (his/her) bad character for the same trait. You must decide the meaning and importance of the character evidence. [¶] [If the defendant’s character for certain traits has not been discussed among those who know (him/her), you may assume that (his/her) character for those traits is good.] [¶] You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt.”

“And so to then get an additional benefit on top of that, to have a character witness portrayed as somebody who knows him well and knows that he’s a law-abiding citizen, I just don’t think it’s fair to the prosecution, given the ruling disallowing cross-examination of that witness concerning Mr. Capanis’s post-prison acts.

“So I’m not going to give 350.”

**B. Analysis**

We review Capanis’s claims of instructional error de novo. (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.) And we consider whether any error was prejudicial under the reasonable probability of a different result standard of *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Larsen* (2012) 205 Cal.App.4th 810, 830.)

Even assuming that the trial court erred in refusing to give the instruction, the error was clearly harmless. The jury heard Riley’s testimony itself, and was further instructed that “In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial.” (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 276 [“In reviewing any claim of instructional error, we must consider the jury instructions as a whole”].) In light of this instruction and the extensive evidence of Capanis’s guilt presented over a nearly two-week trial, there is no reasonable probability of a different result had the jury been specifically instructed that it could “take [Riley’s] testimony into consideration” in determining whether the People had proved Capanis guilty beyond a reasonable doubt.

**IV. The Trial Court Did Not Err in Concluding that Certain of Capanis’s Past Convictions Were Relevant**

**A. Additional Background**

Before trial, the prosecution sought to admit four of Capanis’s past convictions in its case-in-chief as relevant to the various gang allegations (see § 186.22, subds. (a) & (f);

§ 190.2, subd. (a)(22)): (1) an October 2004 conviction for carrying a concealed firearm (former § 12025, subd. (a)(1)), at which time Capanis told officers that he was holding the gun for Brandon Arroyo, a Varrio Concord Norte (VCN) Norteño gang member; (2) a December 2004 conviction for carrying a loaded firearm (former § 12031, subd. (a)), at which time Capanis told officers that he was trying to disassociate from the Norteños and was having trouble with them because they believed he had stolen a gun; (3) a September 2005 conviction for felony grand theft (Pen. Code, § 487, subd. (a)), based on an incident in which Capanis and two other men, some of whom were wearing red bandanas, stole three hunting rifles from a residence; and (4) a March 2007 conviction for armed robbery (Pen. Code, § 211), based on an incident in which Capanis committed a robbery with David Riley, who was subsequently validated in prison as a Northern Structure member.

Defense counsel objected to the admission of evidence of these convictions under Evidence Code section 352 “given the age of some of these, the duplicity of multiple gun convictions, the lack of significant relevance that there was gang activity afoot in these. . . .” After the prosecutor filed a supplemental motion regarding the gang evidence, the trial court heard argument and ultimately ruled the convictions listed above admissible as relevant to the gang allegations.

At trial, Martinez Police Officer Kevin Busciglio testified regarding the arrest that led to the October 2004 conviction. He testified that Capanis told him that he received the gun from “Brandon,” but did not provide a last name and the prosecution appears not to have introduced any other evidence that “Brandon” was Brandon Arroyo and a Norteño. Similarly, Martinez Police Officer Steven Gall testified to the circumstances of the December 2004 conviction, but when asked whether Capanis told him that “the trouble he was having was with [the] Antioch Norteños,” Officer Gall answered “Not that I recall.” However, the prosecution introduced testimony regarding the March 2007 conviction that the perpetrators wore red bandanas, and that Capanis committed the March 2007 armed robbery with David Riley, who went to prison for that offense and was subsequently validated as a Northern Structure member.

B. *Analysis*

Capanis argues that the admission of each of the prior convictions was an abuse of discretion because they were irrelevant. In particular, he argues that the 2004 convictions were remote in time and had no gang connection, that the red bandanas used in the 2005 burglary did not establish any gang connection, and that the evidence was insufficient to establish that the 2007 robbery had any gang connection.

“We review for abuse of discretion a trial court’s rulings on relevance and the exclusion of evidence under Evidence Code section 352. [Citation.]”<sup>9</sup> (*People v. Avila* (2006) 38 Cal.4th 491, 578.) “ ‘Relevant evidence’ means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.)

For purposes of the gang allegations, the prosecution was required to show that the gang engaged through its members in a “pattern of criminal gang activity,” further defined as the commission of specified criminal offenses (so-called “predicate offenses”) within a certain time frame, “on separate occasions, or by two or more persons.” (§ 186.22, subds. (e) & (f); see *People v. Tran* (2011) 51 Cal.4th 1040, 1044.) For both the special circumstance and the substantive offense of active participation, the prosecution was required to prove that Capanis knew that members of the gang “engage in, or have engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (a); see CALCRIM No. 736.) The prosecution sought to introduce Capanis’s prior convictions, each of which was a predicate offense as defined in section 186.22, subdivision (e), to satisfy these requirements.

Turning first to the 2004 firearm convictions, we find no abuse of discretion in the trial court’s conclusion that they were relevant. Capanis argues that because the prosecution did not introduce any evidence that Brandon Arroyo was a Norteño, nothing established that the conviction was gang-related. But to the extent that the jury

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<sup>9</sup> Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

concluded that Capanis himself was a Norteño member at the time the crimes were committed, they were relevant as predicate offenses and to demonstrate a pattern of criminal activity by the Norteño gang. (See *People v. Tran*, *supra*, 51 Cal.4th at p. 1046 [predicate offense can be established by proof of an offense committed by defendant on a separate occasion].)

Capanis also argues that the 2004 convictions were irrelevant because no evidence established that he was a member of the Norteño gang at that time. But the 2004 convictions were part of a larger pattern, followed by the 2005 burglary conviction, and then by the 2007 robbery conviction, for which Capanis went to prison and where he was subsequently validated as a Northern Structure member. In addition, Walsh testified that in 2009, Capanis told him that he had his Huelga bird tattoo, a Norteño symbol, for “numerous years.” It was for the jury to decide whether Capanis was a member of the Norteño gang at the time of the 2004 convictions and to weigh the evidence of those convictions accordingly. They were not irrelevant, and there was no abuse of discretion in admitting them.

Capanis next argues that the September 2005 burglary conviction was irrelevant because there was no evidence that it was committed by Norteños. But as discussed above, to the extent the jury concluded that Capanis himself was a Norteño at the time of the burglary, there was indeed evidence that the crime was committed by at least one Norteño. In addition, the evidence showed that the burglary was committed by men wearing red bandanas, and the prosecution’s expert testified that red was a Norteño color. It was for the jury to decide what weight to give this evidence, and whether it established that the burglary was a predicate offense. It was not irrelevant, and there was no abuse of discretion in admitting it.

Finally, Capanis argues that there was no evidence that the 2007 robbery was committed by Norteños, because Riley was subsequently labeled as a “Northerner” in prison only for housing purposes, and because the robbery pre-dated the time that Capanis himself was validated as a Northern Structure member after he was incarcerated. But as discussed above, the jury could infer, given the balance of the evidence, that Riley

and Capanis's gang membership predated their validation in prison. The evidence was thus not irrelevant and its admission not an abuse of discretion.

Capanis also argues that these prior convictions should have been excluded under Evidence Code section 352 because their probative value was outweighed by the probability of undue consumption of time and a substantial danger of undue prejudice and confusion. We disagree. As noted, the predicate offenses were a necessary component of the gang allegations, and not cumulative of other evidence. Evidence of all four convictions took up approximately 100 pages of transcript in a trial spanning approximately 1,000 pages and lasting some 9 days. With respect to undue prejudice and confusion, the jury was expressly instructed to consider the prior convictions evidence only for specific purposes relating to the gang charges, and not as evidence of Capanis's bad character. In sum, we find no abuse of discretion in the admission of these prior convictions.

**V. *The Trial Court Did Not Err In Permitting Navarro to Testify Regarding An Offer Of Money for His Whereabouts***

**A. *Additional Background***

Capanis moved in limine to exclude testimony by Nestor Navarro that he had heard from a third party that Capanis's girlfriend was offering up to \$1,000 for information on his whereabouts. The trial court denied the motion, finding that the testimony was relevant to Navarro's state of mind and his willingness to testify. Ultimately Navarro testified that "[s]omebody came to my house and told me that [Capanis's girlfriend] was offering money to give them information about who I was." The trial court instructed the jury that it should consider this testimony only as to the issue of Navarro's state of mind and any bias or motive he may have had in connection with his testimony.<sup>10</sup> At the end of trial, the jury was again instructed that the hearsay

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<sup>10</sup> "THE COURT: I'll allow it. Ladies and gentlemen, this is information that is only relevant to one issue, . . . that issue being the witness' state of mind in terms of his testimony and any bias or motives he may have in connection with his testimony here. It's not necessarily any indication of anything relating to Mr. Capanis or anything that he

statement to Navarro was “admitted for the limited purpose of how it affected Mr. Navarro’s state of mind and not for their [*sic*] truth” and that it should “consider such evidence only for the limited purposes for which the evidence was admitted and for no other reasons.”

**B. *Analysis***

Capanis argues that the trial court abused its discretion under Evidence Code section 352 in admitting this evidence because there was no corroboration for the statement, and thus its “probative value was correspondingly low.” Capanis also argues that the limiting instruction compounded the alleged prejudice by telling the jury that the information was “not necessarily” connected to Capanis’s actions. Capanis’s arguments are meritless. Whether the rumor was corroborated or not, the fact that Navarro heard it was relevant to his state of mind and his willingness to testify. (See *People v. Burgener* (2003) 29 Cal.4th 833, 869 [“There is no requirement, however, that threats be corroborated before they may be admitted to reflect on the witness’s credibility”].) The jury was twice instructed not to consider the testimony for any purpose other than Navarro’s state of mind. There was no abuse of discretion.

**VI. *The Trial Court Did Not Err In Permitting Expert Testimony Regarding Two Prison Reports***

**A. *Additional Background***

As part of his testimony regarding the January 18, 2009 prison assault, Captain Grether testified that he had reviewed a prison injury report created by a nurse indicating that Vela had sustained a laceration to his face after being assaulted by Capanis. The prosecution laid the foundation for the report to be admitted as a record made within the duty of a public employee pursuant to Evidence Code section 1280 through Grether’s testimony that prison officials had an obligation to generate such a report any time an inmate was injured, and that such reports were kept in the official records of the CDCR in the normal course of business. The report itself does not appear to have been marked as

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has done. It’s solely for the purpose of your making a decision as to the witness’ frame of reference and frame of mind as he testifies here yesterday and today.”

an exhibit or offered into evidence, but the prosecution indicated that it had been provided to the defense. Defense counsel objected to testimony about the contents of the report as hearsay.

As noted, Casey Walsh, a gang investigator at the CDCR, testified for the prosecution. Walsh testified that he had reviewed a prison incident report regarding the incident in which Capanis had been found with written notes regarding the Northern Structure gang known as a “kite.” Again, the prosecution laid the foundation for the report to be admitted as a record made within the duty of a public employee under Evidence Code section 1280 through Walsh’s testimony that prison officials had an obligation to generate such incident reports and that they were kept in the official records of the CDCR in the normal course of business. The trial court indicated it would admit the report into evidence under Evidence Code section 1280 once certain redactions were made.<sup>11</sup>

The next day, the trial court again discussed the two reports. The trial court appeared to state that neither report had yet been marked as an exhibit or entered into evidence, but held that both reports would be admissible under the record of a public employee exception to the hearsay rule set out in Evidence Code section 1280. Defense counsel objected to the use of the contents of the reports as hearsay, but had “no objection to the witness testifying about the contents as opposed to the actual reports coming in.” The trial court overruled defense counsel’s objections to the contents of the reports.

#### B. *Analysis*

Capanis argues that the testimony regarding the prison incident report and the nurse’s incident report was case-specific hearsay that violated his rights under the confrontation clause and *People v. Sanchez* (2016) 63 Cal.4th 665, 680 (*Sanchez*).

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<sup>11</sup> It is not entirely clear from the record whether the report was ultimately entered into evidence. The record indicates that it was entered into evidence as the People’s Exhibit No. 78, but that it was then “temporarily” returned to the prosecutor to make certain redactions.

“In light of our hearsay rules and *Crawford* [v. *Washington* (2004) 541 U.S. 36], a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term.” (*Sanchez, supra*, 63 Cal.4th at p. 680.)

In *Sanchez*, our Supreme Court “surveyed the substantial body of case law regarding the proper formulation of ‘testimonial’ and summarized the concept as follows: ‘Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial.’ [Citation.] Also, in order to be considered testimonial, ‘the statement must be made with some degree of formality or solemnity.’ [Citations.]” (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 583.)

On appeal, Capanis does not dispute that the reports at issue were subject to the hearsay exception for public records in Evidence Code section 1280, thus satisfying the first step of the analysis under *Sanchez*. (See Evid. Code, § 1280 [records not hearsay where made “by and within the scope of duty of a public employee” “at or near the time of the act, condition, or event” and where “sources of information and method and time of preparation were such as to indicate [their] trustworthiness”].) Rather, Capanis argues that the reports were made for the primary purpose of preserving facts for later use at trial, and were therefore testimonial hearsay within the meaning of the confrontation clause. (See *Sanchez, supra*, 63 Cal.4th at pp. 689–695.)

The record refutes Capanis’s contention that the primary purpose of the reports was to preserve facts for later use at trial. Grether testified clearly that prison officials had a duty to “immediately” fill out the injury report form whenever an inmate was

injured. And Walsh similarly testified that the report regarding the kite was “mandated” to be generated by the CDCR. This testimony indicates that the reports were prepared as required by the CDCR to facilitate the operation of the prison, not to “ ‘memorialize facts relating to past criminal activity’ ” or to “ ‘preserv[e] facts for later use at trial.’ ” (*People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 583.)

Capanis’s reliance on *Sanchez* is unavailing. In *Sanchez*, the prosecution’s gang expert relied on both police reports regarding several of defendant’s contacts with the police and on “STEP notices,” which inform the recipient that he or she is associating with a known gang and records the details of a contact with police, in opining that the defendant was a gang member. (*Id.* at pp. 672–673.) The *Sanchez* court found the police reports testimonial because they were compiled during police investigation of completed crimes, and the STEP notices testimonial because the portion of the notice retained by the police served no purpose other than to record the details of the defendant’s police contact for later use at trial. (*Id.* at pp. 694–697.) Here, by contrast, there was no investigation of completed crimes, and the reports were required to be generated by prison rules in response to events such as an inmate altercation or injury. We conclude that the reports were nontestimonial and thus their admission did not violate Capanis’s rights under the confrontation clause.

## **VII. *The Prosecution Proved the Required Organizational Relationship Between the Norteño Gang and the VNS Subset***

The substantive gang offense in count 2 required the prosecution to prove “[f]irst, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang’s members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang.” (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130; § 186.22, subd. (a).)

Capanis argues that substantial evidence does not support the jury’s finding that the third element was satisfied because his accomplice in the shooting, Stephens, was alleged to be a member of VNS, not a Norteño. He also argues that the second element

was not satisfied because Hernandez and Gutierrez, who were alleged to have committed predicate offenses, were likewise alleged to be members of VNS, not Norteños. In particular, Capanis argues that the prosecution failed to prove the requisite organizational connection between VNS and the Norteño gang under *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*).

In *Prunty*, the prosecution sought to apply the gang enhancement in section 186.22, subdivision (b) to the defendant based on his membership in the Norteño gang and the Detroit Boulevard subset, and introduced as predicate offenses two crimes committed by members of two other Norteño subsets, the Varrio Gardenland Norteños and the Varrio Centro Norteños. (*Prunty, supra*, 62 Cal.4th at pp. 68–69.) Other than expert testimony that members of both of these subsets “referred to themselves” as Norteños, the prosecution “did not introduce specific evidence showing these subsets identified with a larger Norteño group. Nor did [the prosecution’s expert] testify that the Norteño subsets that committed the predicate offenses shared a connection with each other, or with any other Norteño-identified subset.” (*Id* at p. 69.)

Our Supreme Court considered “what type of showing the prosecution must make when its theory of why a criminal street gang exists turns on the conduct of one or more gang subsets.” (*Id.* at p. 67.) It held that “where the prosecution’s case positing the existence of a single ‘criminal street gang’ for purposes of section 186.22(f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets.” (*Id.* at p. 71.) “In general, evidence that shows subset members have communicated, worked together, or share a relationship (however formal or informal) will permit the jury to infer that the subsets should be treated as a single street gang.” (*Id.* at pp. 78–79.) But it is not enough for the prosecution to show “the group simply shares a common name, common identifying symbols, and a common enemy.” (*Id.* at p. 72.)

*Prunty* went on to identify several types of evidence the People may present to demonstrate the associational relationship between a gang and one of its subsets. The prosecution may, for instance, “show that various subset members exhibit behavior

showing their self-identification with a larger group.” (*Prunty, supra*, 62 Cal.4th at p. 71.) This self-identification evidence can include facts that demonstrate two gang subsets “mutually acknowledge one another as part of that same organization,” but it is insufficient to show “merely that a local subset has represented itself as an affiliate of what the prosecution asserts is a larger organization.” (*Id.* at p. 79.) The prosecution may also elicit testimony that alleged subsets of an overarching gang “use . . . the same ‘turf’ ” and routinely act to protect the same territory. (*Id.* at p. 73.) Facts indicating two or more subsets have “ ‘work[ed] in concert to commit a crime’ ” or “ ‘hang out together’ and ‘back up each other’ ” also may help demonstrate the requisite informal association among subsets alleged to comprise a larger criminal street gang. (*Id.* at p. 78.)

*Prunty* concluded that the evidence of the predicate offenses in that case was insufficient to demonstrate the required associational relationship because there was no “evidence tending to show collaboration, association, direct contact, or any other sort of relationship among any of the subsets he described,” and the evidence did not “demonstrate that the subsets that committed the predicate offenses, or any of their members, self-identified as members of the larger Norteño association.” (*Id.* at p. 82.)

With respect to the connection between VNS and the Norteños, Sergeant Kindorf testified that the best way to think of different subsets of a gang is as “neighborhood chapters,” such that individuals who are from a particular area can affiliate with and become a member of the subset corresponding to that area. These subsets can be small, corresponding to a single neighborhood, or large, spanning multiple cities and counties. In 2012 in Contra Costa County, Varrio North Side (VNS) was the “dominant subset” of the Norteño gang, a “very broad and far reaching subset gang” spanning from Martinez to Modesto. Norteño subsets, including VNS, attend meetings known as “juntas” where they discuss how they are going to implement the “dictates” of the larger organization, including, for example, which subsets are going to operate in which areas and who will have control over the drug trade in a particular area. The East Bay “regiment” of the Norteños, which includes Contra Costa County, operates under the direction of a

regimental commander who reports to the state-level organization. Kindorf twice testified that VNS was part of the overall Norteño umbrella.

In the first place, Capanis's argument that Stephens, Hernandez, and Gutierrez were only shown to be members of VNS and not the Norteños is somewhat overstated. With respect to Hernandez, Kindorf opined that he was an "active member and participant of the Norteño gang, and specifically Varrio North Side," and repeatedly gave his opinion that Hernandez was a member of *both* VNS and the Norteños. Similarly, Kindorf testified that Gutierrez was a member of "VNS and the Norteño gang." And Kindorf opined that Stephens was a "Norteño gang member part of VNS" and a "Norteño" on August 5, 2012.

In any event, we find that Kindorf's testimony was sufficient to demonstrate the required "associational and organizational connection" between the Norteños and the VNS subset. In particular, Kindorf's testimony that VNS was a subset controlling a specific geographic area, and that it reported to the state-level Norteño organization through "juntas" demonstrated that VNS is part of a "loose approximation of a hierarchy." (See *Prunty, supra*, 62 Cal.4th at p. 77.) And Kindorf's testimony that the various Norteño subsets coordinated to split control of the drug trade reflects a "degree of collaboration, unity of purpose, and shared activity" to benefit the larger organization. (*Id.* at p. 78) While not overwhelming, we conclude that this was substantial evidence in support of the finding that there was an "associational and organizational" connection between the VNS subset and the Norteños.

The cases relied up on by Capanis are distinguishable. In *People v. Cornejo* (2016) 3 Cal.App.5th 36, the defendant was alleged to be a member of the Oak Park Norteño subset, and the prosecution's expert testified as to two predicate offenses committed by two different Norteño subsets (the same expert and predicate offenses as in *Prunty*). (*Id.* at p. 47–48.) With respect to the requisite connection between the defendant's subset and the larger Norteño gang, the expert "testified [that] Norteño subsets adhere to the same structure, have the same beliefs, and claim membership in the larger Norteño gang. However, the detective did not testify as to what that purported

structure was, or that it was somehow imposed upon the subsets by the larger Norteño organization.” (*Id.* at p. 49.) The court concluded that this was insufficient under *Prunty*. (*Id.* at p. 50.) Here, by contrast, Kindorf did testify as to the structure of the VNS subset, and how structure was imposed from the higher levels of the Norteño gang.

In *People v. Nicholes* (2016) 246 Cal.App.4th 836, the defendant was again alleged to be a member of the Oak Park subset, and the prosecution’s gang expert testified regarding predicate offenses committed in his area, which the *Nicholes* court took to mean other subsets based in that area. (*Id.* at pp. 845–846.) The prosecution’s expert “testified generally that Nuestra Familia ‘started and has control over the Norteño criminal street gang’ and ‘there’s a paramilitary type setup of the Norteño criminal street gang where they have what they call regiment commanders or they have a regimen [*sic*] set up.’ ” (*Id.* at p. 846.) But the expert gave no testimony regarding the “actual subsets at issue.” (*Id.* at pp. 846–847.) In this case, Kindorf testified that the organizational structure he described involved the VNS subset in particular. In short, Capanis’s challenge to his conviction under *Prunty* fails.

### **VIII. Substantial Evidence Supports the Jury’s Application of the Special Circumstance**

Section 190.2(a)(22) provides: “The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under section 190.4 to be true: [¶] . . . [¶] (22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of section 186.22, and the murder was carried out to further the activities of the criminal street gang.”

Although Capanis’s argument is not well articulated, he appears to contend that the above reference to section 186.22, subdivision (f) means that being an “active participant in a criminal street gang” for purposes of the special circumstance requires that each of the elements of the substantive offense set forth in section 186.22, subdivision (a) be met, i.e., that the defendant “participates in any criminal street gang

with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity” and that he “willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” (§ 186.22, subd. (a).) Capanis argues that, for the reasons discussed in the previous section, there was not substantial evidence of every element of count 2 and thus he was not an “active participant in a criminal street organization gang” for purposes of the special circumstance in section 190.2, subdivision (a)(22).

We are doubtful that the special circumstance imposes the requirement that Capanis suggests. Capanis relies on *People v. Robles* (2000) 23 Cal.4th 1106 (*Robles*). In *Robles*, the Supreme Court construed the phrase “active participant” in former section 12031, subdivision (a), which makes carrying a loaded firearm a felony where the defendant “is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22,” to require proof of each of the elements of the substantive offense in section 186.22, subdivision (a), under the rule of lenity. (*Id.* at p. 1115.) But the statute at issue in *Robles* referenced section 186.22, subdivision (a), which defines the substantive offense, whereas the statute at issue here references subdivision (f), which defines a “criminal street gang.” In *People v. Carr* (2010) 190 Cal.App.4th 475 (*Carr*), the court rejected the argument Capanis makes here on this basis, finding that the decisive point in *Robles* was the Legislature’s reference to subdivision (a) as opposed to subdivision (f). (*Id.* at p. 487 [“Based purely on the statutory language, therefore, the People need not separately prove a defendant’s subjective knowledge of the criminal activities of his or her fellow gang members to establish the section 190.2, subdivision (a)(22), special circumstance”].) Capanis simply asserts that *Carr* was wrongly decided.

In any event, even accepting his interpretation of the requirements of the special circumstance, Capanis’s argument fails. As noted, Capanis was charged with and found guilty of the substantive offense set forth in section 186.22, subdivision (a). His only challenge to his conviction on that count is his argument that the definition of “criminal street gang” was not satisfied because the requisite organizational connection was not demonstrated between the Norteño gang and the VNS subset under *Prunty*. As we have

already considered and rejected that argument, Capanis’s challenge to the special circumstance finding necessarily fails as well.

**IX. *Capanis Is Entitled to Remand To Permit the Trial Court To Exercise Its Discretion to Strike the Firearm Enhancement***

On October 11, 2017, while this appeal was pending, the Governor signed Senate Bill No. 620. (Sen. Bill 620 (2017–2018 Reg. Sess.) § 2.) That legislation provides that effective January 1, 2018, section 12022.53, subdivision (h) is amended to permit the trial court to strike, in its discretion, a firearm enhancement.<sup>12</sup> As noted, Capanis was charged with a firearm enhancement under section 12022.53, subdivision (d) in connection with count 1, the jury found the firearm allegation true, and the trial court imposed the then-mandatory sentence enhancement of 25 years to life consecutively to the balance of Capanis’s sentence. Capanis argues, and the Attorney General concedes, that because his appeal was not final as of January 1, 2018, the amended section 12022.53 applies retroactively to his sentencing. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424–28.) However, the Attorney General argues that a remand for resentencing is unnecessary because the record demonstrates that the trial court would not have struck the enhancement even if it had the discretion to do so.

At sentencing, the trial court had this to say with respect to the firearm enhancement: “[A]s I understand the case law, because of the finding by the jury under 12022.53(a) and (d), that the defendant intentionally discharged a firearm causing great bodily injury and/or death that a consecutive sentence of 25 years to life is to be imposed and is mandated and is under the law required to be imposed. The case I cite for that proposition is *People v. Shabbaz*, 38 Cal.4th at page 55. And so the 25 years to life is imposed as well as in addition to the life without parole for the underlying offense.”

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<sup>12</sup> The amended section 12022.53, subdivision (h) provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, § 2.)

We do not agree with the Attorney General that a remand would be an entirely idle act. The Attorney General points out that in sentencing Capanis on counts 2 and 3, the trial court stated that its sentences were “ ‘part of an overall package that includes a conviction that has a sentence of life without parole’ ” and that if the trial court was “put in a position of sentencing on counts 2 and 3 where the terms actually matter to the overall sentence that might be served, I might very well select upper terms on either or both of these.” But while these comments may suggest that the trial court would not be inclined to strike the firearm enhancement, they do not clearly indicate that it would not do so. (See *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425 [“a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement”].) We likewise reject the Attorney General’s argument that remand is unnecessary because, given the life sentence without possibility of parole, striking the firearm enhancement will have no practical effect. (See *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 427 [“[A remand for resentencing is not an idle act just because a defendant may not derive a present practical benefit should the trial court exercise its discretion in the defendant’s favor.”].) We take no position on how the trial court should exercise its newfound discretion under Senate Bill No. 620, but we conclude the trial court should be provided the opportunity to exercise that discretion in the first instance.

**X. *The Trial Court’s Restitution Order Was Unauthorized***

At sentencing, the trial court ordered Capanis to pay both a restitution fine of \$720 and victim restitution of approximately \$22,700. With respect to the restitution, the trial court made two orders. First, the trial court ordered the CDCR to collect 60 percent of any monthly earnings from Capanis’s work in prison or \$75 per month, whichever is greater. Second, it ordered that funds (some \$1,097.90) in Capanis’s account at the county jail “not be changed, moved, modified, or leaned on, or affected in any way for the next 90 days” in order to permit the prosecution to file the necessary paperwork to collect that money to satisfy the restitution judgment.

Capanis argues that the trial court exceeded its authority by ordering that 60 percent of his monthly earnings be collected, because California Code of Regulations, title 15, section 3097, subdivision (c) provides that “when an inmate owes any obligation pursuant to a direct order of restitution imposed by a court, the department shall deduct 50 percent or the balance owing, whichever is less, from the inmate’s wages and trust account deposits regardless of the source of such income, subject to the exemptions enumerated in subsection (j). In addition, an administrative fee of 10 percent of the deduction shall be deducted to reimburse the department for its administrative costs, for a maximum deduction of 55 percent.” The Attorney General appears to concede that the trial court’s order violated this regulation. Accordingly, we will modify the restitution order to reduce the percentage of Capanis’s monthly earnings to be collected from 60 to 55 percent.

Capanis also argues that the trial court had no authority to “freeze” his account at the county jail for 90 days in order to permit the government to attempt to collect the funds therein. Capanis asserts, relying on *People v. Willie* (2005) 133 Cal.App.4th 43, that a writ of execution was the only proper way to attach the funds and the trial court had no authority to freeze the funds temporarily.

We agree with the Attorney General that the trial court had the inherent authority to temporarily freeze the funds for a reasonable time so the prosecution could seek to collect them in satisfaction of the restitution fine. (See Code Civ. Proc. §§ 128, 187; *Fairfield v. Superior Court of Los Angeles County* (1966) 246 Cal.App.2d 113, 120 [“Every court has power ‘To compel obedience to its judgments, orders, and process’ in an action or proceeding pending before it, and to use all necessary means to carry its jurisdiction into effect, even if those means are not specifically pointed out in the code.” (quoting Code Civ. Proc. § 128)].) *People v. Willie*, *supra*, does not require us to find otherwise. In that case, before a hearing on a writ of execution took place, the trial court granted the prosecution’s motion to release funds held by the police to the Victim Compensation Board in satisfaction of a restitution fine. (*Id.* at p. 47.) The *Willie* court vacated the order granting the motion because the proper method of attaching funds to

satisfy a restitution judgment is through a writ of execution. (*Id.* at pp. 49–50.) Here, Capanis does not challenge the eventual disposition of the funds or argue that they could not have been obtained to satisfy the restitution fine or judgment, but merely challenges the trial court’s authority to temporarily freeze those funds pending that process. Capanis’s claim of error fails.

## **XI. *There Was No Cumulative Error***

Capanis argues the cumulative effect of the above alleged errors requires reversal of his conviction, even if none alone were individually prejudicial. As we have found no substantial error in any respect, this argument must be rejected. (See *People v. Butler* (2009) 46 Cal.4th 847, 885.)

## **XII. *Capanis Is Entitled to Remand Under Senate Bill No. 1393***

On September 30, 2018, after briefing in this case was complete, the governor signed Senate Bill No. 1393. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) § 2.) That legislation amends Penal Code section 1385 to grant the trial court the discretion to strike the five-year sentence enhancement for a previous serious felony conviction under Penal Code section 667, subdivision (a)(1), effective January 1, 2019.<sup>13</sup> As noted, Capanis was sentenced to an additional five-year term on count 1 under Penal Code section 667, subdivision (a)(1) based on his 2007 robbery conviction. The trial court also imposed, and stayed, a five-year enhancement on count 2 based on the 2007 robbery conviction. We granted Capanis leave to file a supplemental brief arguing that he is entitled to a remand for resentencing under Senate Bill No. 1393, and the Attorney General filed a response.

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<sup>13</sup> Penal Code section 1385, subdivision (b) previously provided that section 1385 did “not authorize a judge to strike any prior conviction for purposes of enhancement of a sentence under Section 667.” The amended Penal Code section 1385, subdivision (b)(1) provides: “If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).” (Stats. 2018, ch. 1013, § 2.)

The Attorney General concedes that because the judgment was not final as of January 1, 2019, Senate Bill No. 1393 applies to Capanis’s sentence retroactively, and further states that the Attorney General has “no argument against this Court’s remanding the case for reconsideration of the imposition of the recidivist enhancement.” Accordingly, we will remand the case to the trial court for the limited purpose of determining whether to exercise its newfound discretion under Penal Code section 1385 to strike the five-year enhancements imposed under Penal Code section 667, subdivision (a)(1).

### **DISPOSITION**

The restitution order is modified to reduce the percent of Capanis’s monthly earnings to be collected from 60 to 55 percent. The cause is remanded to the trial court for the limited purposes of: (a) determining whether to exercise its discretion under Senate Bill No. 620 to strike the 25-year to life firearm enhancement under Penal Code section 12022.53, subdivisions (d) & (h); and (b) determining whether to exercise its discretion under Senate Bill No. 1393 to strike the five-year enhancements imposed under Penal Code section 667, subdivision (a)(1). In all other respects, the judgment is affirmed.

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Richman, J.

We concur:

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Kline, P. J.

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Miller, J.

*People v. Capanis (A151544)*